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NATURAL RESOURCES DEFENSE COUNCIL

March 13, 2006

Via Email and U.S. Mail

Director Alexis Strauss
U.S. Environmental Protection Agency,
Region IX, WTR-5
75 Hawthorne Street
San Francisco, CA 94105-3901

Chair Jeffrey Young
California Regional Water Quality
Control Board, Central Coast Region
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401-7906

Re: Re-issuance of the 301(h) Waiver, Draft NPDES/WDR, and Proposed Settlement Agreement for the Morro Bay-Cayucos Sewage Treatment Plant

Dear Chair Young, Members of the Board, and Director Strauss,

The Natural Resources Defense Council ("NRDC") hereby submits comments on the March 3, 2006 "Response" submitted by the City of Morro Bay ("Sewage Plant" or "Plant"). These preliminary comments address the Plant's 8-page cover letter and Attachments B and C, *including the Plant's extremely significant admission that both of NRDC's shorter upgrade schedules can, in fact, be met* in the right circumstances (see below for a full discussion of this admission).[1] Our comments, with a limited exception

[1] Moreover, because of the unlawful "moving target" approach to deadlines and materials, we reserve the right to supplement these preliminary comments with a fuller set of comments and supporting documentation consistent with a legally appropriate timeframe. The timeframe imposed has not permitted NRDC to fully respond. By way of example, we have not been able to obtain a full set of information regarding treatment upgrades conducted at other sewage treatment plants referenced by the Plant in its response document. (We have, however, requested such information through appropriate records requests.) We have not been able to even obtain many of the citations set forth in Attachment A, since the underlying documents were not provided. Similarly, by the deadline imposed by the Regional Board we have not been able to obtain a technical review of the 2005 monitoring report nor have experts complete review of new information contained in Attachment A. (These examples merely illustrate the prejudice imposed by the Regional Board's deadline, but they are not intended to describe the full extent of that prejudice.)

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related to the submittal of two studies[2] (one in draft form), do not address Attachment A—a nearly 30-page document with a 240-page attachment—that NRDC received one week ago. Given the scope and technical nature of these documents, it has been impossible to review and respond in a week's time. Since the Regional Board provided thirty days to the Sewage Plant to prepare its submittal, it should surprise no one that NRDC has been able to provide only a partial response in the three business days we have had to review attachment A and the five business days we had to review attachments B and C.

Procedural Irregularities and Good Faith Attempt to Comply

NRDC provides these comments in a good faith attempt to respond as rapidly as possible to the new information the Regional Board allowed the Plant to submit 30 days after the close of public comment. However, we wish to be clear that NRDC maintains and reasserts its strong objection to the process that is being followed by the Regional Board here, as set forth in NRDC's Petition for Review, submitted to the State Water Resources Control Board on February 27, 2006. This process is unfair and prejudicial. In this connection, the Regional Board's extension of the previously set March 8 deadline to March 13 does not resolve our objections, given that it essentially maintains the previously set (inadequate) schedule, now adjusted due to the late delivery of information to NRDC. Indeed, given that this "extension" was set with full knowledge that the Regional Board had asked the same NRDC staff working on this issue to meet with Monterey cities for two days in Northern California during the same time period underscores that the extension provided NRDC in reality with very little additional time. At no time since NRDC objected to this process has the Regional Board or its staff responded substantively to NRDC's objections; adequately explained the basis for its approach; or fulfilled the requirements established in its own notice of public hearing respecting this matter.

Preliminary Response

Overall, the Sewage Plant's response is mostly a rhetorical attack on NRDC and its comments.[3] The Plant merely makes vague and conclusory assertions that are entirely

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[2] Attached to this letter for submittal into the record are: Kator, H., *Concerns and Risk Factors Associated with Discharges of Secondary Treated Sewage Into Very Shallow Coastal Waters* (2003); Miller, W., *Salmonella ssp., Clostridium perfrigens, and Plessiomonas shigelloides in marine and freshwater invertebrates from coastal California ecosystems* DRAFT (2006).

[3] For example, in its response, Morro Bay accuses NRDC of "eleventh hour posturing," characterizes NRDC's logic as "twisted," its approach as "scatter-shot" and a "last-minute ambush strategy," which is "fraught with numerous inaccuracies, unsubstantiated contentions, and repetitious jargon," "erroneous, specious, and inaccurate" comments, "disingenuous statements," "unfounded speculation," and "bogus criticism." These retorts bring to mind Shakespeare's Hamlet, "The lady doth protest too much, methinks." Hamlet (III, ii, 239).

unsupported by evidence in efforts to overcome NRDC's comments.[4] Critically, the Plant continues to ignore that it, not NRDC, bears the burden of proof in a proceeding under Section 301(h) of the Clean Water Act. As such, the response fails to advance the Plant's 301(h) waiver application and related documents. In fact, the contrary is true:

- The Plant makes the extremely significant admission that "the time lines suggested by CEA could be met in an ideal situation." Attachment B, at 1. As such, the Plant agrees that even the shortest CEA timeline (4.5 years) is possible to implement. The Plant's admission that it could comply with a 4.5 year schedule in "ideal" circumstances of necessity constitutes an admission that compliance with the 6.5 year CEA schedule can be attained even if circumstances are not "ideal." The issue framed by the record now could not be clearer: can and should the Regional Board ratify an upgrade schedule that is twice as long as the Plant admits can feasibly be implemented in the right circumstances? We submit the answer is "No."
- Another significant admission by the Plant concerns the Morro Bay Estuary. In carefully stating that "[t]here is no evidence that wastewater constituents enter the Morro Bay Estuary in any ecologically meaningful amount," the Plant admits that "wastewater constituents *enter* the Morro Bay Estuary." Morro Bay Response, at 3. This new admission bars the issuance of the 301(h) waiver:
    - First, under 40 C.F.R. § 125.59(b)(4), "No section 301(h) modified permit shall be issued: Where the discharge of any pollutant *enters* into saline estuarine waters which at the time of the application do not support a balanced indigenous population of shellfish, fish, and wildlife."[5] Because this prohibition is absolute and no causal relationship is required, the Plant's unsupported belief that its effluent is not an "ecologically meaningful amount" does not circumvent the prohibition.[6]
    - Second, both federal and state antidegradation policies afford the highest level of protection for the Morro Bay Estuary and bar any activity that would compromise water quality in any way, mandating that "water quality shall be maintained and protected." 40 C.F.R. § 131.12. Despite the Plant's unsupported belief that its pollutant contribution is not "meaningful," the Plant admits its effluent enters the estuary. This additional amount of pollution triggers the antidegredation policy prohibition, thus barring the 301(h) waiver.

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[4] Abuse of discretion is established when findings are not supported by the evidence. Cal. Code Civ. Proc. § 1094.5(b-c). *See also, e.g., Jennings v. Palomar Pomerado Health Systems, Inc.*, 114 Cal. App. 4th 1108, 1119-20 (2003) (conclusory evidence does not satisfy test of admissibility).

[5] 40 C.F.R. § 125.59(b)(4) (emphasis added); EPA, *Amended Section 301(h) Technical Support Document*, at Statutory Criteria and Regulatory Requirements section (1991, last updated 2004) ("EPA Guidance"); EPA Guidance, at III.D.5.

[6] *See* 40 C.F.R. § 125.59(b)(4).

- The Plant asserts a new theory that it claims supports its 9.5 year upgrade schedule: without a "documented environmental excursion attributable to the discharge," there is no reason to accelerate the 9.5 year timeline. Attachment B, at 1-2. However, whether there is a "documented environmental excursion" is not the standard for a conversion schedule. Rather the standard remains that the upgrade be completed "as fast as possible."[7] In any event, NRDC's comments indeed point to several "documented environmental excursions attributable to the discharge." *See, e.g.,* NRDC, *Time is of the Essence*, at Part 3C.
- The Plant also argues that the 9.5 year timeline is "within the time line range we have experienced for coastal communities similar to Morro Bay Cayucos." Attachment C, at 3. First, this argument is inherently self-contradictory in that it conflicts with the Plant's contrary assertion that "each project is unique" (*id.*), a statement which makes the comparisons the Plant goes on to make of no particular relevance. *See* Attachment B, at 4-5. Second, the information provided is vague and often based on "personal communication," not verifiable or reliable documents. Third, even if the information is taken at face value for the purpose of comparison, the references to other "similar" projects ultimately undercuts the contention that the 9.5 year schedule for Morro Bay is "as fast as possible."[8]

  Differences in Scope of Projects Compared

  - The Newtown Creek plant is the largest wastewater treatment plant in New York City, processing over 300 million gallons per day, and is in fact part of an overall program to upgrade five other major plants.[9] An upgrade to a facility that processes hundreds of time the wastewater treated at Morro Bay-Cayucos is self-evidently not comparable;
  - The Imperial Beach plant likewise processes 25 million gallons per day (with a peak capacity of 75 mgd), and is an international wastewater treatment plant, with the attendant complications inherent in projects that involve the foreign policy of the United States;[10]
  - Watsonville's plant processes 7 million gallons per day, close to 7 times the daily average flow of the Plant;[11] the Half Moon Bay plant processes 4 million gallons per day, close to four times the average dry weather flow of the Plant,[12] and the Pismo Beach plant processes 40 percent more wastewater per day than the Plant.[13]

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[7] *See* Cal. Water Code § 13385(j)(3)(C); 23 C.C.R. § 2243; and 40 C.F.R. § 122.47(a)(1).

[8] *See* Cal. Water Code § 13385(j)(3)(C); 23 C.C.R. § 2243; and 40 C.F.R. § 122.47(a)(1).

[9] *See* http://www.water-technology.net/projects/newtown/.

[10] *See* http://www.ibwc.state.gov/html/background.html.

[11] *See* http://www.ci.watsonville.ca.us/publicworks/w.html.

[12] *See* http://www.samcleanswater.org/techinfo/design.htm.

[13] *See* http://www.sfei.org/camp/servlet/DisplayProgram?which=General&pid= NCCA0048151.

Moreover, the San Francisco Regional Board ordered the Half Moon Bay plant to complete a facility improvement and upgrade in 4 years.[14]

Differences in Tasks Included in Project Comparisons

- The Central Coast comparisons are not accurate in another respect because the time schedules set forth by the Plant blatantly compare "apples to oranges." For instance, in order to assert that upgrades at Half Moon Bay and Watsonville took 9 years, the Plant includes long time periods for initial planning. However, the Plant itself admits in its response that planning for the Morro Bay upgrade commenced 3 years ago. Morro Bay Response, at 1. This 3 year period is not included in the current 9.5 year upgrade timeline; it is additive to it. Hence, subtracting similar periods from the Half Moon Bay and Watsonville upgrades yields an "apples to apples" comparison of a 5 year upgrade schedule for Half Moon Bay and a 6 year schedule for Watsonville—both substantially shorter than that now proposed for Morro Bay.

Failure to Show Other Projects Were Accomplished "As Fast as Possible"

- The Plant does not contend or prove that the time periods for the other facilities, no matter their differences, occurred "as fast as possible." In fact it suggests the opposite, noting that with Watsonville, there were "funding disputes, which have delayed the completion of designs and beginning of construction." Attachment B, at 4.

- The Plant asserts that CEA's proposed timelines would limit public participation in the Plant upgrade. *See generally* Attachment C. The Plant does not explain how this is so, and in point of fact, NRDC has provided enough time for public input in each element of the conversion schedule.[15] The Plant does not explain how its schedule, which contains no specific time periods devoted to public review, offers the public any different set of rights. Indeed, as a public interest organization, the Regional Board might imagine that NRDC would not propose limiting public participation opportunities since it would clearly be against our own institutional interests.
- The Plant asserts, apparently seriously, that the inefficiencies and in-fighting that have characterized the Morro Bay-Cayucos relationship is an "operational" factor legally relevant to an assessment of whether the 9.5 year timeline is consistent with the "as fast as possible" requirement. Morro Bay Response, at 4. However, the Plant's response is flawed in two respects:

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[14] *See* http://www.waterboards.ca.gov/enforcement/docs/r02/1998/R2-1998-0125-ORDER-450.pdf.

[15] *See* CEA Letter (Feb.1, 2006), at 4-8; NRDC, *Time is of the Essence*, at Part 4.

- First, the Plant ignores that the significant timeline reductions achieved by CEA are not dependent only on reducing time allocated for agency in-fighting.[16] Rather, as a review of its submittal clearly shows, CEA proposes reductions in other processes—such as running the upgrade processes in parallel; reducing the time for facilities planning; expediting the financial plan and funding process; and providing for a reasonable environmental review and permitting process.[17] Hence, even if agency foot-dragging and disagreement were a legitimate consideration (it is not, see below), this hardly justifies the 9.5 year timeframe or rebuts CEA's far shorter schedule.
- Second, the Plant's recast of its inflated coordination schedule as operationally necessary misses the mark legally. In the Clean Water Act context, "operational" refers to the working condition of the facility and actions associated with its function.[18]

- For the first time, the Plant mentions the idea of using Membrane Bioreactors to combine secondary versus tertiary treatment. Attachment B, at 2. However, the Plant has asserted (and now does not argue to the contrary) that "the timeline is not affected by the consideration of secondary versus tertiary treatment."[19] Thus, the decision of which upgrade process to follow does not expand the schedule and is part of the routine facilities planning process.[20]
- In conclusory fashion, the Plant asserts that even with expected flow increases, the Plant will continue to operate "essentially" as it has in the past. Attachment C, at 1. The Plant appears to misunderstand the thrust of the NRDC's comment, which is that as average flow increases, necessarily more sewage will be bypassed during wet weather events. Indeed, the Plant itself recognizes that its average daily flow in 2005 increased to 1.25 mgd (*see* 2005 Annual Report, at 2-21), when previous estimates were that flow would not increase to that rate until 2014.
- The Plant states that "the use of the term 'clear and convincing evidence' [in the proposed settlement agreement] is purely stylistic and does not relate to any specific evidentiary

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[16] The Keogh Staff Report reveals the basis of a one-year coordination time period as attributable to the "difficulty the City and District have historically demonstrated in reaching consensus in the decision making process." Staff Report by Bruce Keogh (May 13, 2005), at 4.

[17] *See* CEA Letter (Feb.1, 2006), at 6-8; Letter from David Stringfield to JPA (May 12, 2005), at 3 ("Many of our clients run the meat of three elements (Facilities, Financial, and Environmental) in parallel.").

[18] *See, e.g.,* Draft Permit, at D-3, D-21 (¶ 25) (citing 40 C.F.R. § 122.41(n)(1)) (discussing, *inter alia*, "operational error").

[19] *See* Letter from David Stringfield to JPA (May 12, 2005), at 1.

[20] *See* Letter from David Stringfield to JPA (May 12, 2005), at 2-3.

standard." Morro Bay Response, at 6. Given this admission, the term should be removed and the proper standard should be inserted.

- The Plant makes a new assertion that the JPA directed its consultants to submit an upgrade schedule that is as fast as possible. Morro Bay Response, at 3. Not only does this fail to actually prove the assertion, but this determination is to be made by the Regional Board, and not the discharger/permit applicant.[21]
- The Plant asserts that "at least six months" should be added to each CEA schedule for Regional Board reviews. Attachment B, at 1. Six months is easily more than twice what would actually be needed.[22]
- In a new gloss on the JPA proceedings, the Sewage Plant significantly mischaracterizes NRDC's participation. Morro Bay Response, at 2. While its complaint is irrelevant in the present proceeding, since 2003, NRDC presented extensive testimony at every JPA meeting regarding the 301(h) waiver—even when we received notice only the day before the hearing—and requested additional public participation at the JPA meeting adopting the settlement agreement.[23] NRDC also submitted nearly a dozen letters and communications to the JPA, its staff, and the Regional Board during the JPA administrative process.

Our preference remains to be able to strongly support all aspects of the proposed decision that will be before your agencies. Towards that end, we invite you to contact us if you have any questions or wish to discuss this matter, at (310) 434-2300.

Sincerely,

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Anjali I. Jaiswal
Michelle S. Mehta
Natural Resources Defense Council

cc: Roger Briggs, Central Coast RWQCB
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[21] *See* Cal. Water Code § 13385(j)(3)(C) ("The *regional board* establishes a time schedule for bringing the waste discharge into compliance with the effluent limitation that is as short as possible. . .") (emphasis added).

[22] *See* 40 C.F.R. § 25.4(c).

[23] December 15, 2005 JPA Meeting.